Sia Hiong Tee & Ors v Chong Su Kong & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1597 OF 2010
RAMLY ALI, AZHAR MA'AH AND ABDUL AZIZ ABD RAHIM JJCA
14 MAY 2012

Land Law — Indefeasibility of title and interests — Sabah Land Ordinance (Cap 68) ('SLO') — Whether SLO provided for indefeasibility of title and interests upon registration — Whether transfer effected by forged instrument could pass valid title to transferee — Whether s 88 of the SLO providing for registration did not have indefeasibility provisions existing under s 340 of the National Land Code — Whether bona fide purchaser for value only protected if he dealt with actual proprietor on the register and not if he dealt with forger

The respondents had set aside in the High Court the transfer of a parcel of their land ('the land') to the appellants on the ground their purported signatures on a power of attorney ('PA') used to effect the transfer had been forged. Although the High Court agreed with the appellants' contention that they were bona fide purchasers for value without notice of the forgery, it held that the fact the land had been registered in their names did not make their title indefeasible. In that context, the court ruled that as the Sabah Land Ordinance ('SLO') was in essence a Torrens system of land registration, the concept of indefeasibility was part of its regime through s 88 of the SLO, but what was not clear was whether the indefeasibility was immediate or deferred. Section 88 in Part V of the SLO provided that 'No new title and no dealing with, claim to or interest in any land, except land still under native customary tenure without documentary title, shall be valid until it has been registered in accordance with the provisions of this Part'. The title deed to the land in the instant case was with the seventh respondent ('R7') who handed it over to an interested buyer for the property for the purpose of doing a valuation. The deed was never returned to R7 and the respondents later discovered the land had been registered in the appellants' names pursuant to a sale and purchase agreement which R7 had purportedly signed on behalf of all the respondents pursuant to a PA allegedly given by the other respondents to him. All the respondents denied they had given R7 any PA or executed any documents for the sale of the land to the appellants. In the instant appeal the appellants, whilst not challenging the High Court's finding of fact that the PA used to effect the transfer was a forgery, nevertheless maintained that the trial judge was wrong not to have held that they had acquired good title to the land as bona fide purchasers for value as they were neither party to the forgery nor had knowledge of the same.

Held, dismissing the appeal with costs:

(1) The appellants' title or interests in the land was defeasible as it was

acquired by the use of a forged instrument. They could not have acquired a valid title to the land though it had been registered in their names (see paras 30 & 32).

(2) Section 88 and Part V of the SLO did not import the concept of indefeasibility of title as found in s 340 of the National Land Code which applied to Peninsular Malaysia. Section 88 had neither the equivalent of s 340(2)(a), (b) and (c) or s 340(3)(a) and (b) nor the proviso to that section which read 'Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such purchaser' (see paras 23 & 29).

(3) There was no provision in the SLO that conferred indefeasibility of title to or interests in land though the importance of registration in passing valid title or interests to the registered owner was recognised under s 88 of the SLO (see para 26).

(4) The court agreed with the respondents' argument that the protection given to a bona fide purchaser for value was limited only to a situation where the purchaser actually dealt with the proprietor whose name was on the register. In this case, the appellants had dealt with the forger in getting themselves registered as the legal owners of the land. The consideration for the purchase of the land was also paid by the appellants not to any of the respondents but to a third party unknown to the respondents. This showed the appellants never dealt directly with the respondents as the registered owners of the land (see paras 35 & 37).

[Bahasa Malaysia summary

Responden-responden telah mengetepikan pindah milik sebidang tanah mereka di Mahkamah Tinggi ('tanah tersebut') kepada perayu-perayu atas alasan tandatangan mereka di atas surat kuasa wakil ('SKW') digunakan untuk melaksanakan pindah milik itu telah dipalsukan. Walaupun Mahkamah Tinggi bersetuju dengan hujah perayu-perayu bahawa mereka adalah pembeli-pembeli bona fide untuk nilai tanpa notis pemalsuan, mahkamah telah memutuskan bahawa hakikat yang tanah tersebut telah didaftarkan atas nama mereka tidak menjadikan hak milik mereka tidak boleh disangkal. Dalam konteks tersebut, mahkamah memutuskan oleh kerana Ordinan Tanah Sabah ('OTS') adalah pada dasarnya merupakan sistem Torrens berhubung pendaftaran tanah, konsep sangkalan adalah sebahagian daripada regimnya melalui s 88 OTS, tetapi apa yang tidak jelas adalah sama ada sangkalan itu adalah serta-merta atau tertunda. Seksyen 88 dalam Bahagian V OTS memperuntukkan bahawa 'No new title and no dealing with, claim to or interest in any land, except land still under native customary tenure without documentary title, shall be valid until it has been registered in accordance with the provisions of this Part'. Surat ikatan hak milik ke atas tanah tersebut dalam

kes ini adalah dipegang oleh reponden ketujuh ('R7') yang telah menyerahkan tanah itu kepada pembeli yang berminat ke atas hartanah itu bagi tujuan membuat penilaian. Surat ikatan itu tidak pernah dikembalikan kepada R7 dan responden-responden kemudian mendapati tanah tersebut telah didaftarkan atas nama-nama perayu-perayu menurut satu perjanjian jual beli yang mana dikatakan R7 telah menandatanganinya bagi pihak semua responden-responden menurut SKW yang dikatakan telah diberikan oleh responden-responden lain kepadanya. Kesemua responden menafikan yang mereka telah memberikan R7 apa-apa SKW atau menyempurnakan apa-apa dokumen untuk jualan tanah kepada perayu-perayu. Dalam rayuan ini perayu-perayu walaupun tidak mencabar penemuan fakta Mahkamah Tinggi bahawa SKW yang telah digunakan untuk melaksanakan pindah milik itu adalah palsu, telah menegaskan bahawa hakim perbicaraan terkhilaf kerana tidak memutuskan bahawa mereka telah memperoleh hak milik yang nyata ke atas tanah tersebut sebagai pembeli bona fide untuk nilai kerana mereka bukan pihak kepada pemalsuan itu dan tidak mengetahui tentangnya.

Diputuskan, menolak rayuan dengan kos:

(1) Hak milik atau kepentingan perayu-perayu ke atas tanah tersebut boleh disangkal kerana ia telah diperoleh melalui alat yang dipalsukan. Mereka tidak mungkin memperoleh hak milik sah ke atas tanah tersebut meskipun ia telah didaftarkan atas nama mereka (lihat perenggan 30 & 32).

(2) Seksyen 88 dan Bahagian V kepada OTS tidak mengimportkan konsep sangkalan hak milik sebagaimana diperuntukkan dalam s 340 Kanun Tanah Negara yang terpakai di Semenanjung Malaysia. Peruntukan s 88 tidak sama dengan s 340(2)(a), (b) atau (c) atau s 340(3)(a) dan (b) mahupun proviso kepada seksyen tersebut yang menyatakan 'Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such purchaser' (lihat perenggan 23 & 29).

(3) Tiada peruntukan dalam OTS yang memberikan hak milik yang tidak boleh disangkal ke atas atau kepentingan dalam tanah itu meskipun kepentingan pendaftaran dalam menyerahkan hak milik atau kepentingan sah kepada pemilik berdaftar diiktiraf di bawah s 88 OTS (lihat perenggan 26).

(4) Mahkamah bersetuju dengan hujah responden-responden bahawa perlindungan yang diberikan kepada pembeli bona fide untuk nilai adalah terhad hanya dalam keadaan di mana pembeli sebenarnya adalah berurusan dengan tuan punya yang namanya terdapat di atas daftar. Dalam kes ini, perayu-perayu telah berurusan dengan pemalsu untuk menjadikan mendaftarkan mereka sebagai pemilik-pemilik sah tanah

tersebut. Balasan untuk belian tanah tersebut juga dibayar kepada perayu-perayu bukan kepada mana-mana daripada responden tetapi kepada pihak ketiga yang tidak dikenali kepada responden-responden. Ini menunjukkan perayu-perayu tidak pernah berurusan secara langsung dengan responden-responden sebagai pemilik-pemilik berdaftar tanah tersebut (lihat perenggan 35 dan 37).]

Notes

For cases on Sabah Land Ordinance (Cap 68), see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) 3582–3583.

Cases referred to

Adorna Properties Sdn Bhd v Boonsoom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

Frazer v Walker and Others [1967] 1 All ER 649, PC (refd)

Gibbs v Messer & Co [1891] AC 248, PC (folld)

Ngui Yu Thau v Wong Mu Khyun & Others [2003] MLJU 106; [2003] 6 CLJ 273, HC (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

National Land Code s 340, 340(2)(a), (b), (c), 340(3)(a), (b)
Sabah Land Ordinance (Cap 68) s 88

Appeal from: Suit No K21–5 of 2006-I (High Cout, Kota Kinabalu)

Grace Chaw Hei Hei (Grace Chaw & Co) for the appellant.
Roland Cheng (Roland Cheng & Co) for the respondent.

Abdul Aziz Abd Rahim JCA:

[1] This is an appeal by the first to fourth appellants (the first to fourth defendant in the High Court) against the decision of Justice David Wong Dak Wah of High Court of Sabah and Sarawak sitting in Kota Kinabalu on 29 April 2010 which allowed the respondents' (the plaintiffs in the High Court) claim to set aside the registration and transfer of a parcel of land measuring 25 acres located in the district of Menggatal, Kota Kinabalu to the first to fourth appellants on the ground that the first to six respondents had never signed the sale and purchase agreement dated 19 March 2004 with the first and fourth appellants.

[2] In opposing the claim, the appellants took the stand that they were not aware of any forgery (if any) in relation to the transfer of the said land and are bona fide purchasers for value without notice.

[3] The learned judge also dismissed the appellants' claim against the third party. The third party is a legal firm of Ms Johari & Zelika and was named as a party in the proceedings at the High Court by the appellants because the third party had handled the legal documentations for the sale and purchase of the said land. The appellants alleged that the third party was negligence in handling the sale and purchase of the said land.

[4] In allowing the respondents' claim, the learned judge found as a matter of fact that the power of attorney with which instrument the transfer was effected, is invalid on the ground that the signatures of the respondents' had been forged. Though the learned judge also found as a fact that the appellants are bone fide purchaser for value without notice, he went further to find that under the Sabah Land Ordinance and in the circumstances of the transfer, the appellants' title to the land is not indefeasible.

[5] The learned judge, we think, based his finding on two facts. Firstly, the power of attorney used as authority to transfer the said land to the appellants is a forgery and secondly, he applied the concept of deferred indefeasibility to s 88 of the Sabah Land Ordinance. As to the concept of deferred indefeasibility we do not agree with the learned judge for the reasons which we state later in this judgment.

[6] In dismissing the appellants' claim against the third party, the learned High Court judge is of the view that the third party owes no duty of care to the appellants.

FACTS OF THE CASE

[7] The brief material facts of this case are succinctly stated in the written judgment of the learned High Court judge and they are reproduced below for easy reference.

[8] The respondents were the registered owners of the land and the custody of the title deed of the land was with the second respondent (now the deceased) until it was given to the seventh respondent allegedly for valuation purposes. It is not disputed that the seventh respondent had intended to sell the land and for that purpose he informed one Tong Chung Hing ('Tong') that he may be agreeable to a sale price of RM2.53m.

[9] Tong later informed the seventh respondent that a certain Mr Ling was interested to purchase the land for RM2.53m and is willing to pay in cash after Mr Ling had seen the original title and had valued the land. Upon the request of Tong, the seventh respondent gave the title deed to the land to Mr Ling for valuation purposes but the title deed was never returned back to the seventh respondent.

[10] It was allegedly discovered later that the appellants had become the registered owners by virtue of a sale and purchase agreement dated 19 March 2004 with the seventh respondent (sic) signing for himself and on behalf of the first to six respondent pursuant to a power of attorney which the first to six respondent had allegedly given to the seventh respondent.

[11] All the respondents alleged that their signatures in the sale and purchase agreement dated 12 February 2004, the power of attorney dated 19 March 2004, the memorandum of transfer dated 25 March 2004 and PDS 15 Form were forged.

THE ISSUE

[12] The principal issue in this appeal is whether the appellants, as bona fide purchaser for value without notice, have acquired good title to the said land upon registration notwithstanding the fact the transfer of the said land to the appellants was by void instrument (namely a forged power of attorney) and that the appellants were neither a party to, nor were aware of, the forgery at the time of the transfer.

THIS APPEAL

[13] In this appeal the appellants do not challenge the finding of fact by the learned judge that the power of attorney that was used as an instrument to effect the transfer of the said land to the appellants is a forged document in that the signatures of the respondents as donors of the power of attorney were forged. Therefore the issue of forgery is a non issue in this appeal.

[14] However we would state at this juncture that the learned judge had applied the correct standard of proof in this case which is that on balance of probability it is for the respondents to prove their case which is grounded on forgery. This principle was stated in very clear terms by the then Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 at p 188. The learned judge was also correct in accepting the unchallenged evidence of the experts PW10 and PW11 called by the respondents to corroborate the direct evidence by the respondents that the

respondents themselves did not sign the impugned power of attorney. On this issue the learned judge wrote in his judgment as follows:

> In my view there is direct evidence from the plaintiffs themselves that they did not sign the power of attorney which had been corroborated by the unchallenged evidence of the experts called by the plaintiffs in PW10 and PW11. It can be said that the expert reports had been quite unequivocal in stating that the plaintiffs did not sign the relevant documents. And when they are not challenged in any way by the defendants, the court though not bound by the opinions of the expert should accept the evidence unless cogent reasons are provided. Here no cogent reasons had been produced by the defendants; hence I have no hesitation in accepting the evidence of the experts.

We fully endorsed the above views by the learned judge.

[15] Nonetheless, the appellants have raised as a ground of appeal in their memorandum of appeal the failure of the learned judge to make a proper appreciation of the uncontradicted evidence of the witnesses which did not at all implicate directly or indirectly the involvement of the appellants in the alleged forgery. It was argued that by such failure the learned judge had overlooked the maxim of *exturpi causa non oritur actio*. It was also contended that the learned judge had misdirected himself on the evidence and erroneously allowed himself to be influenced by irrelevant considerations in that the learned judge failed to appreciate that the alleged forgery was not committed by the appellants and that there was no pleading by the respondents alleging that the appellants have committed forgery against the respondents.

[16] As we have said earlier the forged power of attorney is a non issue as this is already a fact found by the trial judge and as an appellate court we should be slow in disturbing this finding of fact. Moreover in their memorandum of appeal the appellants never challenged this finding of fact by the trial judge.

[17] It is pertinent however to note that the learned judge made no finding as to the fact whether the appellants were a party to the forgery or that the appellants have knowledge of the forgery nor there was any pleadings by the respondents to that effect in their statement of claim. Does these factors have a significant bearing on the title acquired by the appellants over the said land being purchasers for value without notice?

[18] The appellants seem to suggest that since they are not party to the forgery and they have no knowledge of the same and moreover no finding was made by the learned judge on those facts, they ought to have acquired good title to the said land because they are purchasers for value without notice of alleged forgery.

[19] In his written submissions, (and in the appellants' memorandum of appeal), learned counsel submitted that the learned judge had failed to judicially appreciate and to draw proper inferences from the evidence adduced in the trial. He submitted that there is inconsistencies in the respondents' witnesses' written statements and their evidence in court during the trial. He submitted that PW4, PW5, PW6 and PW7 in their evidence said they had never visited the vendors' solicitors firm. However in their police reports lodged on 2–3 August 2005, all the respondents admitted to have visited the vendors' solicitors firm. Another inconsistency, learned counsel pointed out, is that under examination the fourth respondent denied having lodged the police report and denied signing the statutory declaration. PW9, who is also the seventh respondent, had contradicted, learned counsel for the appellants said, the evidence of respondents which said that they the respondents never intended to sell the said land or that they knew nothing about any land dealings when PW9 testified that all the co-owners of the said land agreed to sell the said land. In view of all these inconsistencies, learned counsel submitted that the learned judge ought to have impeached the respondents' credibility, yet he failed to do so.

[20] We do not agree with this proposition. In our view it is not the duty of the trial judge to institute impeachment proceedings without an application being made by the party in whose interest the impeachment is sought. We are of the view that in circumstance where there are inconsistencies shown between an oral statement and written statement of a witness and there is no application for impeachment of the witness, the role of the trial judge is to consider and evaluate the evidence bearing in mind the inconsistencies and decide on the evidential value of those evidence. In other words, it goes only to the weight or probative value to be accorded to the evidence.

[21] Next, learned counsel for the appellants submitted that the learned judge ignored direct evidence by TPW1, the vendors' solicitor when he testified that he had taken instruction from the seventh respondent who had produced the original title and the original power of attorney for the purpose of preparing the transfer of the said land to the appellants. TPW1 also testified that PW9 (ie the seventh respondent) executed the conveyancing documentation in his office and in his presence and whose signature TPW1 had duly attested to. TPW1 also testified that he had prepared the original power of attorney and it was duly attested by a Commissioner of Oath, but the latter was not called as a witness. Learned counsel for the appellants submitted all these evidences were ignored by the learned judge. However the learned judge, he said, had taken into account the evidence of PW9 (ie the seventh respondent) that original title to the said land was released to one Mr Ling with intention to sell to him, but it was never returned back to PW9. Learned counsel submitted that the

respondent was aware of all this because PW9 told them and yet the respondent did not put on an inquiry or lodged a caveat on the said land. This, he said was never considered by the trial judge.

[22] Learned counsel for the appellants also submitted that the learned judge had failed to consider the evidence that TPW1, pursuant to the terms of the power of attorney, had released the full purchase price to PW9's Public Bank account and which payment had been acknowledged by PW9. Learned counsel for the appellant submitted that the learned judge ignored the evidence of PW9's attempt to deny receipt of the said purchase price by alleging that he lent his Public Bank account to one Mr Ling whom he barely knew. PW9, he said, gave evidence that he signed ten blank cheques at the request of Mr Ling/Ah Tong which facilitated third parties to withdraw from PW9's account. Learned counsel submitted that in the circumstance, even if there is any element of forgery, the respondents must not be allowed to take advantage of the alleged forgery occasioned by their own conduct. The respondents, she submitted were at all material times privy to the alleged forgery or fraud as PW9 (the seventh respondent) was the only part dealing with and facilitating the alleged fraudsters; and for this proposition learned counsel cited *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182. Thus it was argued that the failure by the learned judge to consider above evidence by TPW1 and PW1 had resulted in the learned judge misdirected his mind on the true issue in the case which is that of the legal doctrine *ex turpi causa non oritur* action; and therefore on the facts of this case there is no basis to defeat s 88 of the Sabah Land Ordinance because the appellants are the bona fide purchasers for value without notice. Learned counsel submitted to hold otherwise is a miscarriage of justice and rendering the innocent bona fide purchasers to bear extreme loss and damage whilst the respondents unfairly enriched.

[23] Such argument is very attractive. However it is settle law, through the cases, that the Sabah Land Ordinance (Cap 68) provides for a modified Torrens system of land registration in that by virtue of s 88 of the Ordinance valid title and interests on land pass to the registered owner only upon such title or interests being registered in accordance with Part V of the Ordinance. However the same s 88 and Part V of the Ordinance do not import the concept of indefeasibility of title as found in s 340 of the National Land Code which is applicable to Peninsula Malaysia. Section 88 in Part V of the Sabah Land Ordinance reads as follows:

> No new title and no dealing with, claim to or interest in any land except, land still under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

[24] In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996]

2 MLJ 12; [1996] 2 CLJ 561, (which was referred to by the learned judge in his judgment) the then Supreme Court speaking through the judgment of Edgar Joseph Jr FCJ, the court said:

> Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered …
>
> …
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> We say so because, unlike the National Land Code, there is no provision in the Land Ordinance conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration. However, s 88 which emphasises the paramount importance of registration in accordance with Part V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, in our view, imply basic Torrens concept that title to or interest in land vests and divests only upon registration.

[25] However, having cited the above passage in his judgment, the learned judge concluded, at p 23, of his written judgment as follows:

> From the above, it is clear that the concept of indefeasibility is entrenched in a Torrens system and since SLO though modified is still a Torrens system, the concept of indefeasibility through s 88 of the SLO can be said to be part of the SLO regime. What is not clear is whether it is immediate or deferred indefeasibility.

[26] We do not agree with his conclusion. As can be seen from the passage we quoted above from the judgment of Edgar Joseph Jr FCJ in *Borneo Housing Mortgage Finance Bhd* it is clear that there is no provision in the Sabah Land Ordinance conferring indefeasibility of title to or interests in land, though the importance of registration in passing valid title or interests to the registered owner is recognised under s 88 of the Ordinance.

[27] In any event the learned judge then went on to discuss the difference between the concept of immediate indefeasibility and deferred indefeasibility. The learned judge referred to and discussed several authorities on the point. In particular the learned judge referred to *Frazer v Walker and Others* [1967] 1 All ER 649, (a Privy Council case arising from an appeal from New Zealand), *Adorna Properties Sdn Bhd v Boonsoom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 where the Federal Court held that s 340 of the National Land Code created the concept of an immediate as opposed to deferred indefeasibility. It is the same concept of indefeasibility upheld by the Privy Council in *Frazer v Walker*. The learned judge also referred to the Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 and quoted extensively

from the judgment of Ariffin Zakaria CJM (as His Lordship then was) on the distinction between immediate and deferred indefeasibility of title under s 340 of the National Land Code 1965. In the latter case the Federal Court held that s 340(3) of the National Land Code creates a deferred indefeasibility concept on its plain reading; and the same Federal Court disapproves the principle of immediate indefeasibility expounded in *Adorna Properties Sdn Bhd* and held it to be bad law. To that extent the case of *Adorna Properties Sdn Bhd* was overruled. However all these discussions are of no direct relevant though analogical support may be drawn from them. Edgar Joseph Jr FCJ said in *Borneo Housing Mortgage Finance Bhd*:

> It follows, therefore, that the Peninsula Malaysian cases such as *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Buxton Et Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481 and *M&J Frozen Sdn Bhd Et Anor v Island Sdn Bhd Et Anor* [1994], *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54 with their emphasis on the defeasibility of the chargee's registered title, guaranteed by s 340 of the National Land Code subject only to the exceptions of fraud or misrepresentation, or where registration has been obtained by forgery or by means of an insufficient or void instrument or where title or interest has been unlawfully acquired, were of no direct relevance to the issues which arose for decision in the present appeal though, of course, the finance company charge could derived analogical support therefrom.

[28] Since we are of the view that the concept of indefeasibility of title does not apply to Sabah Land Ordinance, can therefore a bona fide purchaser without notice acquired valid title to land or interests in land under s 88 of the ordinance upon registration, as in the appellants' case, though the registration was obtained by void instrument; in this instant case the forged power of attorney.

[29] It is to be noted that s 88 of the Sabah Land Ordinance has neither the equivalent of s 340(2)(a), (b) and (c) or s 340(3)(a)-(b) nor the proviso to that section which reads 'Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such purchaser'.

[30] It would appear therefore that the appellants' title or interests in the said land could be defeated if it can be shown that it was acquired by forgery or using forged instrument or insufficient instrument. In this regard, we would like to refer to a passage by Gopal Sri Ram JCA (as His Lordship then was) in the Court of Appeal in the *Adorna Properties*' case and which was referred to by the trial judge in his written judgment. His Lordship said:

> … it is axiomatic that a forged instrument is null and void and of no effect …. It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument.

[31] In this regard we noted that the trial judge has found that there is no direct statutory intervention in the Sabah Land Ordinance to alleviate the situation where one obtained a title to land vide a void instrument.

[32] Thus, guided by the passage by Gopal Sri Ram JCA in the *Adorna Properties Sdn Bhd*'s case quoted above and coupled with the finding of fact by the trial judge in this case that the power of attorney that was used as authority to transfer the said land to the appellants is a forgery, we agree with the learned trial judge that the title of the appellants to the property is defeasible and that the appellants could not have acquired a valid title to the said land though the land has been registered in the name of the appellants.

[33] In coming to the above conclusion we are fully aware of a passage by Richard Malanjum J (as His Lordship then was) in *Ngui Yu Thau v Wong Mu Khyun & Others* [2003] MLJU 106; [2003] 6 CLJ 273 wherein His Lordship had said that:

> However in Sabah with specific reference to land the principle as enunciated by the Federal Court in *Adorna Properties* applies notwithstanding the lacuna in the Ordinance. No one derives good title or interest from or through a forged instrument unless he satisfied the doctrine of bona fide purchaser for value and without notice.

[34] However, as to the question immediate of indefeasibility of title, *Adorna Properties Sdn Bhd* has been overruled by *Tan Ying Hong v Tan Sian San & Ors Tan*.

[35] Moreover in this case, learned counsel for the respondents submitted that the protection given to bona fide purchaser for value is limited only to a situation where the purchaser is actually dealing with the proprietor whose name is on the register. He based this proposition on a passage in *Gibbs v Messer & Co* [1891] AC 248 which appears at pp 254–255 of the report and which reads as follows:

> The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register, and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

[36] We accept this proposition of the law. In this case the facts show that the seventh respondent who intended to sell the said land had informed one Tong Chung Hing that he (ie seventh respondent) may be agreeable to sell price of RM2.53m. Tong later informed the seventh respondent that a certain Mr Ling was interested to purchase the land at that price and is willing to pay cash. The seventh respondent then gave the title deed, at the request of Tong, to Mr Ling for valuation purposes but the title deed was never returned to the seventh respondent. Eventually it was discovered that the appellants had become the registered owners of the said land by virtue of a sale and purchase agreement dated 19 March 2004 with the seventh respondent signing for himself and on behalf of the first to the sixth respondent pursuant to a power of attorney which the first to six respondent had allegedly given to the seventh respondent; and which power of attorney the trial judge has found to be a forgery.

[37] On these facts the learned judge found that there is no dispute that the appellants had been dealing with the forger in getting themselves registered as the legal owners of the said land. The learned judge also found that in this case that the disbursement of the consideration paid by the appellants for the purchase price of the land was not to any of the respondent but to people not known to the respondent. This shows that the appellant never dealt directly with the respondents as the registered owners of the said land. In this regard we do not think the learned judge had misdirected himself on the evidence. The evidence of PW9 and TPW1 revolves around the issue whether the power of attorney was forged or otherwise and whether the respondents had signed the memorandum of transfer for the said land. In our opinion the learned judge had considered this evidence in the light of the two experts evidence on the signature appearing on the power of attorney and the memorandum of transfer which was not challenged and the direct evidence by the respondents that they never signed the power of attorney or the memorandum of transfer. And the learned judge preferred the evidence of the experts over that of TPW1. We think he is entitled in law to do so. As trial judge he is the arbiter of fact as well as of law. With respect to the argument that the respondents were unfairly enriched, we observe that there is no evidence, and the learned judge found so, to show that the money that was allegedly paid into PW9's account was

received by the respondents. Instead, the evidence as found by the learned judge was that the money was paid to a third party unknown to the respondents.

[38] The next issue to be considered is the appellants' third party claim. The learned trial judge had dismissed this claim. In their memorandum of appeal the appellants contend that the learned judge erred in law and in fact when he erroneously held that the third party owes no duty of care be it in tort or contract to the appellants.

[39] On this issue the learned judge had this to say in his ground of judgment:

> The preliminary question which needs to be addressed is whether the third party owes a duty of care to the defendants. It is undisputed that both the plaintiffs and the defendants had engaged different solicitors to act for them in respect of the legal documents for the sale and purchase of the property. The third party acted for the plaintiffs (though denied by the plaintiffs) while DW2 acted for the defendants. That being the case, the third party owes no duty of care be it in tort or contract to the defendants. In tort, there is no relationship of proximity between the third party and the defendants. In contract, the defendants had no retainer with the third party. The only person who had relationship of proximity and a retainer with the defendants is DW2 and as he is not party to this suit, the court is prohibited from making any finding on that relationship.

[40] The learned judge also found that the defendants had engaged DW2 as their solicitors and that the question of representation by third party that certain legal documents are proper does not arise in so far as his dealing with the defendants is concerned.

[41] Since the learned judge had made findings of facts on the issue involving the relationship between the third party and the appellants, we do not think that we should disturb such findings. In fact we may say that on the evidence we agree with the findings of the learned judge.

[42] For the above reasons, we dismissed the appeal with costs and affirmed the decision of the learned High Court judge.

Appeal dismissed with costs.

Reported by Ashok Kumar